

February 8, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Basic Service Tier Encryption, MB Docket No. 11-169; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67; Revision of the Commission's Program Carriage Rules, MB Docket No. 11-131; Video Device Competition, MB Docket No. 10-91; Commercial Availability of Navigation Devices, CS Docket No. 97-80; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket No. 07-198

Dear Ms. Dortch:

On February 7th, Harold Feld and John Bergmayer of Public Knowledge (PK) met with Lyle Elder, Brendan Murray, Steven Broecker, Alison Neplokh, Nancy Murphy, David Konczal, Michelle Cary, Mary Beth Murphy, and William Lake of the Media Bureau, to discuss several matters.

Cable Basic-Tier Encryption

In this proceeding, PK has argued that the Commission should ensure that users are kept whole if a cable system begins encrypting its basic tier. PK's arguments have focused primarily on protecting low-income users from bill shock. But institutional users and Boxee have raised issues that deserve to be more fully developed. If users of innovative video devices like the Boxee live TV product rely on unencrypted basic tier cable, then (especially given the inaction on AllVid) those users should be protected. Additionally, the Commission could serve the interests of both institutional users and cable systems if it clearly spelled out what each side's rights and responsibilities are.

The FCC has an obligation to periodically revisit and update its rules, and no incumbent user has a right to keep things the way they are forever. At the same time, when it updates its rules, the Commission must deal with the facts as they are and make sure that its rule changes do not subtract from the public interest. One of the advantages of a rulemaking proceeding, as opposed to the waiver process that was previously employed on this issue, is that it encourages more parties to make voices heard, so that the Commission can get a better sense of where the public interest actually lies. On seemingly-technical issues like basic tier encryption, PK knows from experience that it can be difficult to get technological innovators and users to tell the FCC how a rule change could affect them. The Commission should take the time to make sure it gets this right.

PK further argued that, to protect low-income users, cable operators should not use any potential rule change as an opportunity to up-sell them on more-expensive packages or devices, and that a better approach to eligibility for free converter boxes (for example, as found in the Lifeline/Linkup programs) than Medicaid is appropriate. Medicaid varies state by state and is under-inclusive. Since the Commission already manages a program with superior standards, it should use them.

Expiration of Program Access Rules

The program access rules have been successful in promoting competition between MVPDs and preventing discriminatory practices that harm consumers. But, at the same time, the DC Circuit has made its skepticism fairly plain. While it upheld the FCC's last order extending the rules, it may not do so again.

With this as a backdrop, the Commission may wish to consider adopting, as part of its overall reform, an adjudicatory process to resolve complaints of violations of Section 628 of the Communications Act. Such a procedure would protect against unfair acts while allowing a more nuanced exploration of the issues on a case-by-case basis, and would allow the Commission's standards to evolve to meet the needs of a changing marketplace.

AllVid

PK reiterated its support for AllVid and noted that, while AllVid is a separate matter from cable basic tier encryption, there are lessons to be drawn from the Boxee Box. Notably, Boxee demonstrates that there is demand for third-party, unaffiliated video devices that present content from multiple sources (including online sources and cable) in a unified interface. Furthermore, AllVid would obviate any need for rules like those prohibiting basic tier encryption, because it would provide for a uniform interface to a network that is agnostic to network design itself.

PK also suggested that the Commission could craft a procedure, similar to the one it may craft for Section 628, for Section 629. This would allow creators of navigation devices to bring complaints of unlawful treatment before the Commission.

Program Carriage

PK urged the Commission to go forward with the program carriage improvements it argued for in the comments filed by Media Access Project and PK; namely, to prohibit discrimination in favor of programmers affiliated with competing MVPDs; impose a shot clock without an ALJ extension; adopt the program access discrimination framework for allocating the burden of proof; expedite discovery through a standing order, limits and oversight; extend carriage terms via a standstill; subject parties to baseball-style arbitrations; and protect competition and diversity in online video. PK noted that the Commission now has experience with adjudications and the shape of program carriage disputes that could feed into improvements to its rules.

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE